

IN THE SUPREME COURT OF THE STATE OF NEVADA

LAS VEGAS METROPOLITAN
POLICE DEPARTMENT,

Petitioner,

vs.

THE EIGHTH JUDICIAL DISTRICT
COURT FOR THE STATE OF
NEVADA, IN AND FOR THE
COUNTY OF CLARK, AND THE
HONORABLE STEFANY MILEY,
DISTRICT JUDGE,

Respondents,

and

AMERICAN BROADCASTING
COMPANIES, INC.; THE
ASSOCIATED PRESS; CABLE NEWS
NETWORK, INC.; CHESAPEAKE
MEDIA I, LLC, D/B/A KSNV-TV; LOS
ANGELES TIMES
COMMUNICATIONS, LLC; THE NEW
YORK TIMES COMPANY; SCRIPPS
BROADCASTING HOLDINGS LLC
D/B/A KTNV-TV; WP COMPANY
LLC D/B/A THE WASHINGTON
POST AND LAS VEGAS REVIEW-
JOURNAL,

Real Parties in Interest.

Supreme Court Case No. **Electronically Filed**
Jun 06 2018 04:54 p.m.
Elizabeth A. Brown
D.C. Case No.: A-17-764169-W
Clerk of Supreme Court
Cons. Case No.: A-17-764169-W

EMERGENCY PETITION FOR WRIT OF PROHIBITION PURSUANT TO
NRAP 21 AND 27(e)

Relief Needed on or Before June 12, 2018

MAC:14687-102 3414408_2

Marquis Aurbach Coffing

Nick D. Crosby, Esq.

Nevada Bar No. 8996

Jackie V. Nichols, Esq.

Nevada Bar No. 14246

10001 Park Run Drive

Las Vegas, Nevada 89145

Telephone: (702) 382-0711

Facsimile: (702) 382-5816

ncrosby@maclaw.com

jnichols@maclaw.com

Attorneys for Petitioner, Las Vegas Metropolitan Police Department

NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a), and must be disclosed. These representations are made in order that the Justices of this Court may evaluate possible disqualification or recusal.

1. The Las Vegas Metropolitan Police Department (“LVMPD”) is a governmental entity and has no corporate affiliation.

2. LVMPD is represented in the District Court and this Court by the law firm of Marquis Aurbach Coffing.

Dated this 6th day of June, 2018.

MARQUIS AURBACH COFFING

By: /s/ Jackie V. Nichols
Nick D. Crosby, Esq.
Nevada Bar No. 8996
Jackie V. Nichols, Esq.
Nevada Bar No. 14246
10001 Park Run Drive
Las Vegas, Nevada 89145
Attorneys for Petitioner, Las Vegas
Metropolitan Police Department

TABLE OF CONTENTS

I.	ROUTING STATEMENT	1
II.	ISSUES PRESENTED AND RELIEF SOUGHT.....	2
III.	STANDARDS OF REVIEW FOR WRIT PETITIONS	4
	A. STANDARDS FOR REVIEWING QUESTIONS OF LAW.....	4
	B. STANDARDS FOR REVIEWING PETITIONS FOR WRITS OF PROHIBITION.	5
IV.	RELEVANT FACTUAL AND PROCEDURAL BACKGROUND.....	6
	A. THE AMENDED PETITION.....	6
	B. THE DISCLOSURE ORDER.....	9
	C. THE COST ORDER.	10
	D. LVRJ’S CONTEMPT MOTION AND REQUEST TO ALTER THE DISTRICT COURT’S PRIOR ORDERS.	13
	E. THE MAY 29TH HEARING.	14
V.	LEGAL ARGUMENT.....	17
	A. THE DISTRICT COURT’S ORDER IS VOID AS IT IS DIVESTED OF JURISDICTION TO ENTER A RULING THAT AFFECTS ORDERS PENDING ON APPEAL.	17
	B. THE DISTRICT COURT ERRED BY REQUIRING LVMPD TO CREATE RECORDS IN RESPONSE TO NPRA REQUESTS.	21
	C. THE DISTRICT COURT ERRED BY REQUIRING LVMPD TO PRODUCE A DOCUMENT THAT IS CREATED AND MAINTAINED BY THE FBI.....	22

D.	THE DISTRICT COURT IMPROPERLY RULED ON LVRJ’S CONTEMPT MOTION.	24
1.	The District Court Committed Reversible Error by Not Recusing Itself after LVMPD’s Objection.	25
2.	The District Court Committed Reversible Error by Granting Relief Without Finding that LVMPD Violated the Court’s Order.	27
VI.	CONCLUSION.....	28

I. ROUTING STATEMENT¹

The Supreme Court should retain this Writ Petition because it involves issues of first impression dealing with the Nevada Public Records Act (the “NPRA”) and the District Court’s ability to narrow public records requests after an order requiring disclosure was issued and currently pending appeal. *See Mack-Manley v. Manley*, 122 Nev. 849, 138 P.3d 525 (2006) (holding that a district court is divested of jurisdiction to revisit issues that are currently pending on appeal). This Writ Petition also concerns the District Court’s power to order LVMPD to create a certification confirming the nonexistence of public records. *See PERS v. Reno Newspapers Inc.*, 129 Nev. 833, 313 P.3d 221 (2013) (holding that a governmental entity is not required to create new documents or customized reports under the NPRA). LVMPD also raises issues with the District Court’s Order requiring the production of a document created and maintained by a federal agency. Finally, this Writ Petition addresses an issue of first impression regarding a District Court’s ability to rule on a contempt motion over LVMPD’s objection to

¹ LVMPD understands that there is no written order and that, generally, an oral pronouncement of judgment is not valid for any purpose. *See Rust v. Clark County School Dist.*, 103 Nev. 686, 688 747 P.2d 1380, 1382 (1987). However, LVMPD anticipates Respondents will have a written order by the June 12, 2018 deadline, wherein LVMPD will be forced to comply with the May 29th Order or face contempt. Thus, LVMPD is seeking emergency relief. As such, LVMPD has relied on the transcript of the hearing and will amend the Writ Petition to include the District Court’s written Order once the same is issued.

the Honorable Judge Miley presiding over the proceeding and the District Court failing to make a determination that LVMPD violated the District Court's Order. *See* NRS 22.030(3) (providing that the judge of the court whose contempt the person is alleged to be shall not preside at the trial of the contempt over the objection of the person). Based upon NRAP 17(a)(10) and (11), this Writ Petition involves both issues of statewide importance and issues of first impression. This matter is not one that would be presumptively assigned to the Court of Appeals under NRAP 17(b).

II. ISSUES PRESENTED AND RELIEF SOUGHT

This Writ Petition presents the following issues:

(A) Whether the District Court was divested of jurisdiction and prohibited from entering an order that affects prior District Court Orders currently on appeal;

(B) Whether the District Court erred by ordering LVMPD to create a public record;

(C) Whether the District Court erred by ordering LVMPD to produce a document created and maintained by the Federal Bureau of Investigation ("FBI");

(D) Whether the District Court erred by presiding over the contempt proceedings despite LVMPD's request for recusal pursuant to NRS 22.030(3);

(E) Whether the District Court erred by granting contempt relief without determining whether LVMPD was, in fact, in violation of the District Court's Order.

LVMPD seeks relief from this Court in the form of prohibition to vacate the District Court's Order requiring the: (1) production of lists enumerating all public records LVMPD has in its possession that are responsive to Respondents' requests; (2) creation of a certification confirming the nonexistence of public records; and (3) production of the evidence log maintained and created by the FBI. First, the District Court lacked jurisdiction to rule on any matter that affects the District Court's prior Orders that are currently pending on appeal. *See Mack-Manley*, 122 Nev. at 855, 138 P.3d at 529-30 (holding that a district court is divested of jurisdiction to revisit issues that are currently pending on appeal). The District Court's Order requiring LVMPD to produce lists enumerating its public records affects the Disclosure Order and Cost Order currently pending on appeal before this Court, and therefore, is void as a matter of law. Second, this Court has determined that the NPRA does not require a governmental entity to create new documents in response to a public records request. *See PERS*, 129 Nev. 833, 313 P.3d 221 (2013) (holding that a governmental entity is not required to create new documents or customized reports under the NPRA). Thus, the District Court's Order that LVMPD create a certification as to the existence of public records must

be vacated. Third, the District Court erred by requiring LVMPD to produce a document created and maintained by the FBI. Documents created by federal agencies are not subject to the NPRA. *See* 5 U.S.C. § 552; NRS 239.005(5). Finally, because LVMPD objected to the Honorable Judge Miley presiding over the contempt proceeding, the District Court erred in entertaining the motion over LVMPD's objection and granting relief to the same without determining LVMPD violated the District Court's Order. *See* NRS 22.030(3). As such, the District Court's Order granting contempt relief must be vacated.

III. STANDARDS OF REVIEW FOR WRIT PETITIONS

A. STANDARDS FOR REVIEWING QUESTIONS OF LAW.

This Court reviews questions of law de novo. *See Birth Mother v. Adoptive Parents*, 118 Nev. 972, 974, 59 P.3d 1233, 1235 (2002). Statutory interpretation is a question of law which this Court reviews de novo. *See id.* Although this Court generally reviews petitions for extraordinary relief with an abuse of discretion standard, this Court will still apply a de novo standard of review to questions of law, such as statutory interpretation, in writ petition proceedings. *See Int'l Game Tech., Inc. v. Dist. Ct.*, 124 Nev. 193, 198, 179 P.3d 556, 559 (2008) (citation omitted).

B. STANDARDS FOR REVIEWING PETITIONS FOR WRITS OF PROHIBITION.

A writ of prohibition is the appropriate remedy for a lower court's improper exercise of jurisdiction. *See* NRS 34.320; *see also* *Smith v. Dist. Ct.*, 107 Nev. 674, 818 P.2d 849 (1991). A writ of prohibition may issue to arrest the proceedings of a district court exercising its judicial functions, when such proceedings are in excess of the jurisdiction of the district court. *See id.* "Jurisdictional rules go to the very power" of a court's ability to act. *Pengilly v. Rancho Santa Fe Homeowners Ass'n*, 116 Nev. 646, 649, 5 P.3d 569, 571 (2000) (citations omitted).

Although an individual can appeal a final judgment, where there is no legal remedy, extraordinary relief is justified. *See* *Zhang v. Dist. Ct.*, 120 Nev. 1037, 1039, 103 P.3d 20, 22 (2004), *abrogated on other grounds by* *Buzz Stew, LLC v. City of N. Las Vegas*, 124 Nev. 224, 181 P.3d. 670 (2008). Petitions for extraordinary writs are addressed to the sound discretion of the Court and may only issue where there is no "plain, speedy, and adequate remedy" at law. *See* NRS 34.330; *see also* *State ex rel. Dep't of Transp. v. Thompson*, 99 Nev. 358, 360, 662 P.2d 1338, 1339 (1983). However, "each case must be individually examined, and where circumstances reveal urgency or strong necessity, extraordinary relief may be granted." *See* *Jeep Corp. v. Dist. Ct.*, 98 Nev. 440,

443, 652 P.2d 1183, 1185 (1982) (citing *Shelton v. Dist. Ct.*, 64 Nev. 487, 185 P.2d 320 (1947)).

This Court will exercise its discretion to consider writ petitions, despite the existence of an otherwise adequate legal remedy, when an important issue of law needs clarification, and this Court's review would serve considerations of public policy, sound judicial economy, and administration. *See Dayside Inc. v. Dist. Ct.*, 119 Nev. 404, 407, 75 P.3d 384, 386 (2003), *overruled on other grounds by Countrywide Home Loans, Inc. v. Thitchener*, 124 Nev. 725, 192 P.3d 243 (2008).

IV. RELEVANT FACTUAL AND PROCEDURAL BACKGROUND

A. THE AMENDED PETITION.

American Broadcasting Companies, Inc. ("ABC"), the Associated Press ("AP"), Cable News Network, Inc. ("CNN"), Chesapeake Media I, LLC, d/b/a KSNV-TV ("KSNV"), Los Angeles Times Communications, LLC ("LA Times"), The New York Times Company ("NYT"), and WP Company LLC d/b/a The Washington Post's ("Washington Post") (collectively the "Coalition") filed an Amended Public Records Act Application Pursuant to Nev. Rev. Stat. § 239.011/Petition for Writ of Mandamus ("Coalitions' Amended Petition") on November 28, 2017. *See* PA 1:1-32. Within the Coalitions' Amended Petition, the following records were sought:

<u>Media</u> <u>Agency</u>	<u>Date</u>	<u>Request</u>
ABC	10/2/2017	“ <u>All body cam, dash cam, CCTV video</u> (publicly and privately owned), as well as <u>any other types of recording</u> connected with the active shooter/mass casualty event on Oct. 1, 2017. Also . . . <u>all police radio</u> traffic and <u>all police reports</u> connected with the incident.” ²
ABC	10/11/2017	“ <u>All 911 audio</u> connected with Oct. 1 shooting incident at Mandalay Bay.” ³
CNN	10/3/2017	“ <u>[A]ll copies of records</u> pertaining to Stephen Paddock . . . specifically including but not limited to 911 dispatch calls, evidence logs, hotel surveillance video, police body cam footage, interview reports, and anything related to this investigation.” ⁴
LA Times	10/10/2017	“the 911 recordings related to the shooting . . .” ⁵
AP	10/12/2017	“ <u>[A]ny and all 911 emergency calls</u> dispatch recordings relating to the shooting . . .” ⁶
AP	10/24/2017	Form request for Body Worn Camera (“BWC”) ⁷
NYT	10/16/2017	“[C]opies of public records that include information about emergency response to the mass shooting . . . [t]his includes all records of phone calls to police, recordings of dispatch and body camera footage.” ⁸

² See PA 1:12-13 (emphasis added).

³ See PA 1:15 (emphasis added).

⁴ See PA 1:17-18 (emphasis added).

⁵ See PA 1:20 (emphasis added).

⁶ See PA 1:22-23 (emphasis added).

⁷ See PA 1:25-26 (emphasis added).

⁸ See PA 1:28 (emphasis added).

KTNV	11/13/2017	<u>Access to all copies of records</u> pertaining to Stephen Paddock, the suspect in the Las Vegas Shooting, specifically including but not limited to 911 dispatch calls, evidence logs, hotel surveillance video, police body cam footage, interview reports, and <u>anything related to this shooting investigation.</u> <u>All applications</u> for search warrants related to the shooting. ⁹
------	------------	---

The Coalition requested that the Court enter an order requiring LVMPD to make available **complete copies of all records.** See PA 1:10 (emphasis added) The Las Vegas Review Journal (“LVRJ”) (collectively with the Coalition, the “Respondents”) submitted a similar Amended Public Records Act Application Pursuant to Nev. Rev. Stat. § 239.011/Petition for Writ of Mandamus on December 6, 2017¹⁰ seeking the following documents:

<u>Media</u> <u>Agency</u>	<u>Date</u>	<u>Request</u>
LVRJ	10/2/2017	Log and call slips of <u>any and all emergency calls</u> made on October 1, 2017 between 8:00 p.m. and 2:00 a.m. on October 2, 2017, including unit logs for police and fire and ambulance dispatch. ¹¹
LVRJ	10/15/2017	Purchase orders for emergency purchases on or after Oct. 1, 2017 and emergency no-bid contracts on or after Oct. 1, 2017. ¹²

⁹ See PA 1:6 (emphasis added).

¹⁰ See PA 1:33-71.

¹¹ See PA 1:46-48 (emphasis added).

¹² See PA 1:61-63 (emphasis added).

LVRJ	11/30/2017	<u>Copies of any and all documents</u> that reflect any weapons obtained through the course of the . . . investigation that are suspected to have belonged to mass shooter Stephen Paddock. ¹³
------	------------	--

Like the Coalition, LVRJ requested the Court to enter an order requiring LVMPD to make available **complete copies of all records**. See PA 1:41 (emphasis added). Although LVRJ never requested the body worn camera, it later joined in the Coalition’s request. See PA 1:41.

B. THE DISCLOSURE ORDER.

On February 7, 2018 the Court entertained oral arguments on the briefing previously submitted regarding Petitioners’ Amended Petitions requesting various documents from LVMPD related to the 1 October shooting. See PA 1:72-78. Despite Respondents’ overly broad and vague public records requests, the District Court granted the Amended Petitions. *Id.* The District Court determined LVMPD failed to meet its burden in demonstrating that the impact on the current investigation outweighs the public’s interest in disclosure. See PA 1:74-75. Summarily, the District Court ordered the disclosure of: 911 calls; body worn camera footage; dash cam footage; CCTV video; evidence logs; dispatch information; interview reports; search warrant returns; affidavits of probable cause; purchase orders and no-bid contracts; and any information on any weapons obtained during the investigation into the 1 October Massacre (the “Disclosure

¹³ See PA 1:65-66 (emphasis added).

Order”). *See* PA 1:76-77. As a result of the District Court’s Order requiring disclosure of all the requested public records, it did not require LVMPD to produce a privilege log as Respondents’ requested. *See* PA 1:72-78. Alternatively, in the “rare and limited circumstances” that confidentiality and privacy concerns did arise, the District Court indicated that LVMPD may prepare a privilege log for future review by the District Court. *See* PA 1:75.

In addition to requiring LVMPD to disclose all the requested records, the District Court ruled that it was not waiving the payment obligations of the NPRA and ordered Respondents to pay the costs associated with the production. *See* PA 1:77. To determine the costs LVMPD was entitled to charge, the District Court requested additional briefing. *See* PA 1:78.

C. THE COST ORDER.

On February 14, 2018, the Parties submitted their respective supplemental briefs on the cost issue. *See* PA 1:79-236; and PA 2:237-462. It was always LVMPD’s position that the requested records were overly broad and burdensome to produce, requiring extraordinary use of personnel to comply with the Disclosure Order. *See* PA 1:87-89; PA 2:370-375. In its supplemental briefing, LVMPD attempted to paint a picture, for both the District Court and Respondents, of the volume of records that were at issue. *Id.* LVMPD indicated that it received approximately 1,600 911 calls in the first 24 hours of the 1 October shooting. *See*

PA 1:87. LVMPD also explained that it would take at least six months to review, redact, and produce the 748 hours of body worn camera footage it had concerning 1 October. See PA 87-88. Similarly, LVMPD estimated that the dispatch information would show about 18,000 radio transmissions, which would also need to be reviewed, redacted and produced. See PA 1:88. While LVMPD could not say for certain the number of interview reports it had, it estimated upwards of 800 reports. *Id.* Like much of the other information, the interview reports would also require redactions of personal information in accordance with the Disclosure Order. PA 1:88-89.

It is more than apparent that the instant public records requests are not typical records requests where the governmental agency is able to copy documents in a matter of minutes, and as such, LVMPD was required to employ extraordinary measures in order to comply with the District Court's Order. PA 1:89. Indeed, LVMPD has implemented a team of officers and supervisors for production purposes so it can timely disclose records, on a rolling basis, in accordance with the Court's Orders. See PA 5:956.

In refuting LVMPD's request for costs, LVRJ's entire argument was premised on the idea that LVMPD's production would not require extraordinary use of personnel. PA 2:381-382. LVRJ further contended that even if extraordinary use of personnel was utilized, LVMPD was not permitted to charge

for staff time. PA 2:382-383. Although Respondents had information on the volume of records being requested, not once did Respondents request to narrow its public records requests from the time the District Court required disclosure to the time the District Court ruled on the cost issue. PA 3:496-542; 3:557-558. Quite tellingly, it was not until March 14, 2018—after the District Court ordered Respondents responsible for the costs associated with production—when Respondents first sought to narrow the requests. PA 3:557-558

On March 9, 2018, the District Court issued its ruling on the cost issue (the “Cost Order”). See PA 2:463-471. The District Court ruled LVMPD may charge copying and staff fees, not to exceed \$0.81 per page in the production of the evidence log and interview reports. *Id.* LVMPD was also permitted to charge for pre-preparation costs associated with the production of dispatch logs. *Id.* It was also ordered that production of body worn camera footage and 911 calls were limited to the actual cost to reproduce the records onto the medium and the actual cost of such medium. *Id.* The District Court reiterated its previous Order and required LVMPD to produce records on a rolling basis. *Id.*

Pursuant to the Nevada Rules of Appellate Procedure, and in order for LVMPD not to waive its appeal rights, LVMPD timely filed its notice of appeal of the Disclosure Order and Cost Order on March 31, 2018. See PA 3:472-492.

LVRJ gave notice it intended to cross-appeal the Cost Order on April 13, 2018. See PA 3:493-495.

D. LVRJ'S CONTEMPT MOTION AND REQUEST TO ALTER THE DISTRICT COURT'S PRIOR ORDERS.

Refusing to recognize that LVMPD is bound by the Disclosure Order, which requires production of all records requested, LVRJ brought, and the Coalition joined, a contempt motion on shortened time against LVMPD, requesting the District Court to modify its previous Orders, which are currently pending on appeal before this Court. See PA 3:496-592. Particularly applicable to this Writ Petition, Respondents argued LVMPD had violated the Disclosure Order, and, as a remedy, LVMPD must provide lists of existing responsive records. See PA 3:524-526; 533. The entire purpose of the “lists” is so Respondents can narrow their requests—even though the Disclosure Order requires production of all requested records. *Id.* In other words, Respondents no longer want all requested records. See PA 5:1078-1080. To support its argument, LVRJ maintained “requiring the requesting party to blindly argue *for disclosure* not only runs contrary to the spirit of the NPRA and our NPRA jurisprudence but it seriously distorts the traditional adversary nature of our legal system.” *Id.* (emphasis added). LVRJ disregards the fact that it is relying on authority regarding *production of a privilege log* in determining whether disclosure is appropriate—not an index of every record that exists after disclosure of all records has been ordered. See PA 964-965. The time to address such a

privilege log has long passed as the District Court already deemed the requested records public and ordered LVMPD to produce the same on a rolling basis. *See* PA 1:72-78. As for its assertions that LVMPD is in contempt, LVRJ contended that LVMPD acted in bad faith by not initially producing a list of records in its possession. *See* PA 524-526. Yet, LVRJ could not cite to the specific provision of the Disclosure Order LVMPD allegedly violated. *Id.* Instead, LVRJ relies on the provision regarding inspection when production is not feasible to support its requested relief. *See* PA 5:1070.

E. THE MAY 29TH HEARING.

On May 29, 2018 the District Court entertained oral arguments regarding LVRJ's contempt motion. *See* PA 5:1064-1156. At the onset, LVMPD objected to the Honorable Judge Miley presiding over the contempt proceedings and requested that the matter be heard before another judge in accordance with NRS 22.030(3).¹⁴ *See* PA 5:1066-1067. Nevertheless, the District Court moved forward with the contempt proceedings and LVRJ's requests to modify the District Court's previous Orders. *Id.* During the hearing, LVRJ's counsel assured the District Court that the contempt motion was a motion to enforce the Court's prior Orders and not a motion to amend the Court's Orders. *See* PA 5:1068.

¹⁴ LVRJ relied specifically on NRS 22.030—contempt outside the presence of the Court—in its contempt motion. *See* PA 3:518.

Although LVRJ sought a variety of relief, the District Court only ruled on one issue and set a status check for June 19, 2018 to address the remaining issues outlined in the contempt motion, including production of the public records. *See* PA 5:1140-1141. In sum, the District Court ordered LVMPD to produce the following documents within two weeks:

- List of 911 calls with the time, location, and duration of call in order for Petitioners to select which calls they want produced;¹⁵
- List of all the officers who responded to the 1 October event and, of those officers, which ones were wearing body worn cameras;¹⁶
- List of the CCTV (Closed Circuit Television) cameras that were on from October 1, 2017 at 9:00 p.m. to October 2, 2017 at 5:00 a.m.;¹⁷
- The evidence log that was created and is maintained by the FBI;¹⁸ and
- Certification that public records regarding dash-cam footage and purchase orders/no-bid contracts do not exist.¹⁹

While LVRJ did not address the production of evidence logs in its briefing, the District Court ordered its production. *See* PA 5:1119-1124. Shortly after the

¹⁵ *See* PA 5:1099-1107

¹⁶ *See* PA 5:1107-1112.

¹⁷ *See* PA 5:1113-1119. In ordering the CCTV camera list, the Honorable Judge Miley indicated that LVMPD should not begin to review and disclose that information until Respondents have had a chance to review the lists and determine what they want.

¹⁸ *See* PA 5:1119-1124.

¹⁹ *See* PA 5:1112-1113.

Cost Order was issued, LVMPD informed Respondents that the only evidence log that existed was created and maintained by the FBI. *See* PA 3:554-555. For the first time, LVRJ raised issues with the evidence log at the hearing. *See* PA 5:1119-1124. At the hearing, counsel for LVMPD once more represented that the evidence logs were created and maintained by the FBI. *Id.* Ignoring the fact that the FBI is not subject to the state's jurisdiction, the District Court ordered the disclosure of the FBI evidence log, indicating that if the FBI had any concern about its disclosure, it could intervene in the case. *See* PA 5:1123-1124.

Throughout the hearing, the District Court made clear that the entire purpose of these "lists" is to streamline production so Respondents can determine what public records they preferred to have in spite of the Disclosure Order requiring LVMPD to produce all requested records. PA 5:1118. Adamant that it was not "changing" or "modifying" the previous District Court Orders, the District Court claimed it had narrowed the prior Orders to save Respondents from "needless expenses" on public records they have now chosen to forego. PA 5:1098; 1132-1133; and 1136-1138. Disregarding the Disclosure Order and Cost Order that hold Respondents responsible for the costs, the District Court continuously questioned LVMPD why Respondents should be forced to foot the bill for the production. *See* PA 5:1094.

Even though LVRJ attempts to disguise its Motion to Amend as a motion to enforce the District Court's Orders, nothing in the Disclosure Order requires LVMPD to produce an index detailing the records in its possession, nor does it mandate that LVMPD create a certification. See PA 1:72-78; PA 2:463-471. LVMPD has until June 12, 2018 to comply with the District Court's Order. See PA 1140-1141. The June 19th status check will address which public records from LVMPD's lists Respondents have chosen to be produced and how LVMPD will be required to produce the new narrowed requests. *Id.*

V. LEGAL ARGUMENT

A. THE DISTRICT COURT'S ORDER IS VOID AS IT IS DIVESTED OF JURISDICTION TO ENTER A RULING THAT AFFECTS ORDERS PENDING ON APPEAL.

The District Court lacked jurisdiction to rule on issues that are currently pending before this Court. A timely notice of appeal divests the District Court of jurisdiction to act and vests jurisdiction with the Supreme Court. *Rust v. Clark Cnty. Sch. Dist.*, 103 Nev. 686, 688-89, 747 P.2d 1380, 1382 (1987). "The point at which jurisdiction is transferred must [] be sharply delineated." *Id.* The reason for this rule is obvious, as scarce judicial resources are wasted and confusion ensues when multiple courts address the same issues at the same time. To this end, this Court has repeatedly held that when an appeal is perfected, the District Court lacks jurisdiction to "revisit issues that are pending before [the Supreme Court]."

Mack-Manley v. Manley, 122 Nev. 849, 855-56, 138 P.3d 525, 530 (2006); *see also Foster v. Dingwall*, 126 Nev. 49, 52, 228 P.3d 453, 455 (2010). Stated inversely, once a notice of appeal has been filed, district courts are limited to entering orders “on matters that are collateral to and independent from the appealed order, i.e., matters that in no way affect the appeal’s merits.” *Mack-Manley*, 122 Nev. at 855, 138 P.3d at 530.

The District Court’s May 29th ruling clearly runs afoul of the Disclosure Order and Cost Order—which are both on appeal. The Disclosure Order and Cost Order established that LVMPD is to produce all requested records on a rolling basis and that Respondents are responsible for the costs associated with production of the same. The District Court’s recent ruling affects both Orders pending before this Court because it alters the application of the Disclosure Order and Cost Order to prioritize records Respondents select. Following this further, the District Court’s May 29th Order requires LVMPD to produce additional documents on a new timeline, which broadens the Disclosure Order. Furthermore, the District Court indicated that LVMPD should not produce CCTV video footage until Respondents have had a chance to narrow their requests. This is entirely inconsistent with the Disclosure Order mandating LVMPD to produce all requested records without unnecessary delay and in a timely fashion.

LVMPD has contended, since the beginning, that the costs associated with production would be significant due to the volume of records it possesses. Respondents now take issue with the volume of records because the District Court ordered them responsible for the cost of production. Unfortunately for Respondents, the time to narrow what records should be disclosed, and at what cost, has long passed. Respondents should have sought to narrow their requests at the beginning of this action—not after the District Court required disclosure of all requested records with Respondents being responsible for the related costs and after LVMPD has appealed both Orders. At a minimum, Respondents could have sought to reconsider the District Court’s Orders, but they failed to do so. The instant case is premised on the Respondents’ requests for any and all records. Had Respondents narrowed their requests from the onset, there is the possibility that this case would not exist. Allowing Respondents to prioritize the initial requests and select the records they now prefer, on a time table dictated by Respondents, is contrary to the Disclosure Order and Cost Order. The NPRA’s procedure for responding to records requests and its judicial remedy are rendered meaningless if a requester can initially seek any and all records and then have the ability, in the midst of litigation, to change its requests. The District Court’s ruling on May 29th must be vacated, as it lacked jurisdiction to order LVMPD to produce lists so that

Respondents can cherry-pick the records they prefer to receive and effectively evade the Disclosure and Cost Order.²⁰

Alternatively, if the District Court was inclined to grant LVRJ's motion, it was required to follow the *Huneycutt* procedure. *Huneycutt v. Huneycutt*, 94 Nev. 79, 575 P.2d 585 (1978). "[A]" party seeking to alter, vacate, or otherwise change or modify an order or judgment challenged on appeal should file a motion for relief from the order or judgment in the District Court." *Foster v. Dingwall*, 126 Nev. 49, 52, 228 P.3d 453, 455 (2010). Despite the general rule that the perfection of an appeal divests the district court of jurisdiction, with the exception to those matters that are collateral to and independent of the appealed order, the District Court may, nonetheless, retain limited jurisdiction to review such motions. *Id.* (citations omitted). If, however, the District Court is inclined to grant the relief requested, then it may certify its intent to do so. *Mack–Manley*, 122 Nev. at 855, 138 P.3d at 530; *Huneycutt*, 94 Nev. at 81, 575 P.2d at 586. Then, the moving party must seek remand of the District Court's Order, with the certification attached, from this Court. *Id.* This Court will use its discretion to consider the movant's request and determine whether it should be granted or denied. *Foster*, 126 Nev. at 53, 228

²⁰ It is important to note that Respondents have never stated an intent to abandon any portion of their requests. Instead, it appears that Respondents want to have access to all records, but direct the priority of disclosure, which is contrary to the prior Orders on appeal.

P.3d at 455. Conversely, the District Court retains jurisdiction to enter an order denying a motion to alter, vacate, or modify the order. *Id.*

In this instance, the District Court should have certified its intent to grant, in part, Respondents' Motion. Respondents would then be required to move this Court for a remand of the previous Orders. Because the District Court failed to certify its intent to grant Respondents' motion, the District Court's ruling is void as a matter of law.

B. THE DISTRICT COURT ERRED BY REQUIRING LVMPD TO CREATE RECORDS IN RESPONSE TO NPRA REQUESTS.

The NPRA establishes that “all public books and public records of governmental entities must remain open to the public, unless ‘otherwise declared by law to be confidential.’” NRS 239.010(1). This Court has explicitly held that the NPRA does not require a governmental entity to create a record or customized reports in response to a records request. *See PERS*, 129 Nev. at 839, 313 P.3d at 225 (citing NRS 239.010(1) (permitting “inspection” and copying by the public); NRS 239.055(1) (permitting a government entity to charge an additional fee for extraordinary resources necessary to comply with “a request for a copy of a public record” (emphasis added))); *see also State ex rel. Kerner v. State Teachers Ret. Bd.*, 82 Ohio St.3d 273, 695 N.E.2d 256, 258 (1998) (concluding that Ohio public records laws impose “no duty to create a new document by searching for and compiling information from [a government agency’s] existing records”).

The District Court committed reversible error by requiring LVMPD to create a public record that certifies the nonexistence of public records. In essence, LVRJ demands that LVMPD prove a negative. The NPRA requires a governmental entity to inform the requester if the governmental entity: does not have legal custody or control of the record (NRS 239.0107(1)(b)); is unable to make the record available by the end of the fifth business day (NRS 239.0107(1)(c)); or is denying the request due to confidentiality (NRS 239.0107(1)(d)). Presumably, the governmental entity would inform the requester if the requested records did not exist. Nothing in the NPRA requires a governmental entity to create a certification explaining that the requested records do not exist. More importantly, this Court has established that the NPRA does not require a governmental entity to create records in response to NPRA requests. *See PERS*, 129 Nev. at 839, 313 P.3d at 225. Accordingly, this Court should vacate the District Court Order requiring LVMPD to create a public record.²¹

C. THE DISTRICT COURT ERRED BY REQUIRING LVMPD TO PRODUCE A DOCUMENT THAT IS CREATED AND MAINTAINED BY THE FBI.

The NPRA provides, unless the law declares otherwise, all public books and public records of a governmental entity are subject to inspection or may be fully

²¹ Furthermore, neither the Disclosure Order nor the Cost Order required LVMPD to create any such certification. As such, the Order to produce a “certification” materially alters the Orders.

copied. NRS 239.010(1). A “governmental entity” includes, but is not limited to, an institution, board, commission, bureau, council, department, division, authority or other unit of government of this State, including, without limitation, an agency of the Executive Department, or of a political subdivision of this State. NRS 239.005(5). Thus, the NPRA does not govern records created and maintained by a federal agency. Moreover, the Freedom of Information Act preempts the NPRA and governs public access to federal agency records. *See* 5 U.S.C. § 552, *generally*.

While it is true that the Disclosure Order requires LVMPD to produce an evidence log, it bears noting that the Order is limited to evidence logs created and maintained by LVMPD and not the FBI. LVMPD does not have an evidence log as the FBI led the criminal investigation and collected the evidence in the investigation. Likewise, the United States District Attorney is responsible for the criminal case against Douglas Haig. The District Court’s May 29th ruling expands the District Court’s Disclosure Order to now encompass FBI records. The May 29th Order must be vacated. First, the NPRA only governs records of State and local governmental agencies—not the FBI. More importantly, the Freedom of Information Act governs public access to federal records and preempts the NPRA. This concept is further supported by the NPRA which requires a governmental entity to inform the requester if another governmental entity has legal custody and

control over the records. See NRS 239.0107(1)(b). Thus, this District Court committed reversible error in requiring LVMPD to produce the FBI's evidence log.

D. THE DISTRICT COURT IMPROPERLY RULED ON LVRJ'S CONTEMPT MOTION.

"[T]he construction of a statute is a question of law." *Edgington v. Edgington*, 119 Nev. 577, 582, 80 P.3d 1282, 1286 (2003) (citation omitted), "In interpreting a statute, 'words . . . should be given their plain meaning unless this violates the spirit of the act.'" *Id.* (citation omitted). "Thus, when a statute's language is clear and unambiguous, the apparent intent must be given effect, as there is no room for construction." *Id.* at 582-83 (citations omitted). "If, however, a statute is susceptible to more than one reasonable meaning, it is ambiguous, and the plain meaning rule does not apply." *Id.* at 583, 1286-87 (citation omitted). "Instead, the legislative intent must be ascertained from the statute's terms, the objectives and purpose, 'in line with what reason and public policy' dictate." *Id.* at 1287 (citations omitted).

Furthermore, "[s]tatutory interpretation should avoid meaningless or unreasonable results, and 'statutes with a protective purpose should be liberally construed in order to effectuate the benefits intended to be obtained.'" *Id.* (citations omitted). "Additionally, 'when construing a specific portion of a statute,

the statute should be read as a whole, and, where possible, the statute should be read to give meaning to all of its parts.”” *Id.* (citation omitted).

The standard of review in a writ petition is appropriate to the review of a contempt order. *Pengilly v. Rancho Santa Fe Homeowners Assoc.*, 116 Nev. 646, 650, 5 P.3d 569, 571 (2000). Whether a person is guilty of contempt is generally within the particular knowledge of the district court, and the district court’s order should not lightly be overturned. *Id.* A writ of mandamus is available to control a manifest abuse of discretion—for example, when the order purportedly violated does not clearly prohibit the conduct engaged in by the contemnor. *Id.* (citation omitted). A writ of prohibition is available where the district court clearly exceeded its jurisdiction. *Id.* (citation omitted).

1. The District Court Committed Reversible Error by Not Recusing Itself after LVMPD’s Objection.

In all cases of contempt arising without the immediate view of the court, the judge of such court in whose contempt the defendant is alleged to be shall not preside at such trial over the objection of the defendant. NRS 22.030(3). Prior to the enactment of this statute, the Court issued a similar ruling in *McCormick v. The Sixth Judicial Court*, 67 Nev. 318, 218 P.2d 939 (1950). The *McCormick* court relied on 8943 of Nevada Compiled Law 1929, the same law that led to the creation of NRS 22.030, and stated:

The legislature has thus declared the public policy of the state, not so much for the protection of an individual litigant, as for the preservation of the respect and high regard the public has always maintained for the courts.... *And so the legislature of this state felt it important to eliminate the possibility of a reasonable apprehension that a judge might not be entirely free from bias in enforcing the orders and decrees of the court of which [she] he is the judge.*

Id. at 331–32, 218 P.2d at 945 (emphasis added). The Nevada Supreme Court held:

If the language of [the statute] were ambiguous there might be room for interpretation or construction. It is, however, ***clear and unambiguous. The judge of the ‘court in whose contempt the defendant is alleged to be’ is, upon objection, precluded from presiding in the trial of the contempt charge.***

McCormick, 67 Nev. at 328, 218 P.2d at 943 (emphasis added). The *McCormick* court also rejected the argument that the statute interfered with the court’s inherent ability to enforce its orders. *Id.* at 329. The Court further held that while the court is not deprived of jurisdiction to hear the matter, the judge is deprived. *Id.* at 330. Finally, the objecting party need not prove actual bias or prejudice, in that it is “implicit in the very situation the possibility of the suspicion of bias or prejudice.” *Id.*

The Honorable Judge Miley’s refusal to recuse herself at LVMPD’s request is reversible error. The purpose of NRS 22.030(3) is to ensure that the Court is free from bias when issuing orders for contempt that occurred outside the presence of the Court. While the Respondents will likely point out that the Honorable Judge

Richard Scotti initially heard and issued the contested Orders, the Honorable Judge Miley has held hearings and issued several orders in this case. Given that the Honorable Judge Miley is the presiding judge in this case, there is a possibility of a reasonable apprehension that she may not be entirely free from bias. As such, the District Court order must be vacated because the Honorable Judge Miley refused to recuse herself upon LVMPD's request.

2. The District Court Committed Reversible Error by Granting Relief Without Finding that LVMPD Violated the Court's Order.

Respondents moved for contempt and requested relief based on LVMPD's disobedience or resistance to the Disclosure Order. The court may impose penalty for civil contempt not to exceed \$500. NRS 22.100(2). In Nevada, if a party is found guilty of disobeying a court order, the court may award reasonable fees and costs incurred by the party seeking to enforce the order. NRS 22.100(3). The court also maintains the inherent authority to enforce its lawful orders. *Noble v. Noble*, 86 Nev. 459, 470 P.2d 430 (1970).

Here, LVRJ moved the District Court to hold LVMPD in contempt and, in part, requested that LVMPD be required to produce a list detailing the records it possesses responsive to the records requests as a remedy. The District Court made no determination that LVMPD violated the Disclosure Order, yet it granted, in part, Respondents' requested relief. The Disclosure Order lacks any requisite of

LVMPD to produce lists because all of the requested records were required to be disclosed, and LVMPD continues to comply with the same. The District Court effectively granted the requested relief of the contempt motion without determining that LVMPD violated the District Court's Orders and, at the same time, modified the Disclosure Order.

Thus, the District Court committed reversible error by: (1) effectively presiding over a contempt proceeding over LVMPD's objection; and (2) granting contempt relief without first determining that LVMPD was in contempt of the Disclosure Order.

VI. CONCLUSION

For the foregoing reasons, LVMPD asks this Court to vacate the District Court's order requiring production of lists and the creation of public records.

Dated this 6th day of June, 2018.

MARQUIS AURBACH COFFING

By: /s/ Jackie V. Nichols
Nick D. Crosby, Esq.
Nevada Bar No. 8996
Jackie V. Nichols, Esq.
Nevada Bar No. 14246
10001 Park Run Drive
Las Vegas, Nevada 89145
Attorneys for Petitioner, Las Vegas
Metropolitan Police Department

**DECLARATION OF JACKIE V.NICHOLS, ESQ. IN SUPPORT OF
EMERGENCY PETITION FOR WRIT OF PROHIBITION**

Jackie V. Nichols, Esq., being first duly sworn, deposes and says:

1. I am an attorney with the law firm of Marquis Aurbach Coffing and attorney of record for Petitioner, Las Vegas Metropolitan Police Department, in the above-captioned case. I have personal knowledge of the matters stated in this affidavit, except for those stated upon information and belief. As to those matters stated upon information and belief, I believe them to be true. I am competent to testify as to the facts stated herein in a court of law and will do so if called upon.

2. The Emergency Petition for Writ of Prohibition must be heard in less than 14 days as the District Court ordered LVMPD to comply with its ruling by June 12, 2018.

3. Specifically, the District Court ordered LVMPD to produce lists enumerating the public records it has in its possession responsive to the Respondent's initial public records requests. The District Court also ordered LVMPD to create a certification related to the public records it does not possess. Additionally, the District Court has required LVMPD to produce an evidence log that was created and is maintained by the FBI.

4. The District Court lacked jurisdiction to enter an order affecting the Disclosure Order and Cost Order because both orders are on appeal and pending before this Court.

5. The District Court also committed reversible error by requiring LVMPD to create a public record for purposes of the NPRA.

6. The District Court committed reversible error by ordering LVMPD to produce an FBI evidence log.

7. The District Court improperly entertained Respondents' contempt motion by presiding over the proceeding after LVMPD's objection and granted contempt relief without determining that LVMPD violated the District Court's order.

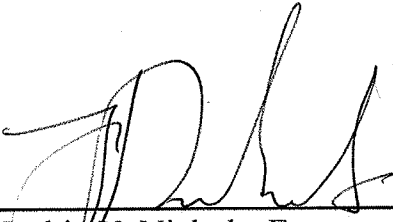
8. This writ petition is LVMPD's only remedy for relief as the District Court's recent ruling is not directly appealable. Furthermore, this Court has held contempt orders are not directly appealable.

9. All grounds advanced in this writ petition were submitted to the District Court.

10. I certify and affirm that the Emergency Petition for Writ of for Writ of Prohibition pursuant to NRS 34.170 and NRS 34.330 is filed in good faith, and that the Petitioner, Las Vegas Metropolitan Police Department, has no plain, speedy, and adequate remedy in the ordinary course of law that the Petitioner, Las Vegas

Metropolitan Police Department, could pursue in absence of the extraordinary relief requested.

Dated this 6 day of June, 2018.



Jackie V. Nichols, Esq.

NRAP 27(e) CERTIFICATE

I hereby certify that this Emergency Petition for Relief Under NRAP 27(e) relies upon issues raised by LVMPD in the District Court, and otherwise complies with the provisions of NRAP 27(e).

As set forth in the body of this petition, emergency relief is needed on or before **June 12, 2018** because the District Court ordered LVMPD to comply with its May 29th ruling by no later than June 12, 2018. The telephone numbers and office addresses of the attorneys for the parties are as follows:

Nick D. Crosby, Esq.
Jackie V. Nichols, Esq.
Marquis Aurbach Coffing
10001 Park Run Drive
Las Vegas, NV 89145
Telephone: (702) 382-0711
Facsimile: (702) 382-5816
Email: ncrosby@maclaw.com
Email: jnichols@maclaw.com
Attorneys for Petitioner, Las Vegas Metropolitan Police Department

Margaret A. McLetchie, Esq.
Alina M. Shell, Esq.
McLetchie Shell LLC
701 East Bridge Avenue, Suite 520
Las Vegas, Nevada 89101
Telephone: (702) 728-5300
Fax: 702-425-8220
Email: maggie@nvlitigation.com;
Email: alina@nvlitigation.com
Attorneys for Real Party in Interest Las Vegas Review-Journal

Joel E. Tasca, Esq.
Justin A. Shiroff, Esq.
Ballard Spahr LLP
1940 Festival Plaza Drive, Suite 900
Las Vegas, Nevada 89135
Telephone: (702) 471-7000
Fax: 702-471-7070
Email: tasca@ballardspahr.com
Email: shiroffj@ballardspahr.com

*Attorneys for Real Parties in Interest American Broadcasting Companies, Inc.;
The Associated Press; Cable News Network, Inc.; Chesapeake Media I, LLC, d/b/a
KSNV-TV; Los Angeles Times Communications, LLC; The New York Times
Company; Scripps Broadcasting Holdings LLC d/b/a KTNV-TV; and WP Company
LLC d/b/a The Washington Post*

According to the attached certificate of service, all parties through their counsel of record have been served electronically through this Court's electronic filing system, and by email as indicated. Furthermore, the undersigned notified the parties by email on June 4, 2018 of the emergency petition and the basis for the same. The undersigned's office also informed the Clerk of the emergency motion on June 6, 2018.

Dated this 6th day of June, 2018.

MARQUIS AURBACH COFFING

By: /s/ Jackie V. Nichols
Nick D. Crosby, Esq.
Nevada Bar No. 8996
Jackie V. Nichols, Esq.
Nevada Bar No. 14246
10001 Park Run Drive
Las Vegas, Nevada 89145
Attorneys for Petitioner, Las Vegas
Metropolitan Police Department

CERTIFICATE OF COMPLIANCE

I hereby certify that I have read this petition, and to the best of my knowledge, information and belief, it is not frivolous or interposed for any improper purpose. I further certify that this petition complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 6th day of June, 2018.

MARQUIS AURBACH COFFING

By: /s/ Jackie V. Nichols
Nick D. Crosby, Esq.
Nevada Bar No. 8996
Jackie V. Nichols, Esq.
Nevada Bar No. 14246
10001 Park Run Drive
Las Vegas, Nevada 89145
Attorneys for Petitioner, Las Vegas
Metropolitan Police Department

CERTIFICATE OF SERVICE

I hereby certify that the foregoing **PETITION FOR WRIT OF PROHIBITION AND PETITIONER'S APPENDIX, VOLUMES 1-5** were filed electronically with the Nevada Supreme Court on the 6th day of June, 2018. Electronic Service of the foregoing document shall be made in accordance with the Master Service List as follows:

Joel E. Tasca, Esq.
Justin A. Shiroff, Esq.
Ballard Spahr LLP
1940 Festival Plaza Drive, Suite 900
Las Vegas, Nevada 89135
Telephone: (702) 471-7000
Fax: 702-471-7070

Email: tasca@ballardspahr.com
Email: shiroffj@ballardspahr.com

*Attorneys for Real Parties in Interest American Broadcasting Companies, Inc.;
The Associated Press; Cable News Network, Inc.; Chesapeake Media I, LLC, d/b/a
KSNV-TV; Los Angeles Times Communications, LLC; The New York Times
Company; Scripps Broadcasting Holdings LLC d/b/a KTNV-TV; and WP Company
LLC d/b/a The Washington Post*

Margaret A. McLetchie, Esq.
Alina M. Shell, Esq.
McLetchie Shell LLC
701 East Bridge Avenue, Suite 520
Las Vegas, Nevada 89101
Telephone: (702) 728-5300
Fax: 702-425-8220

Email: maggie@nvlitigation.com;
Email: alina@nvlitigation.com

Attorneys for Real Party in Interest Las Vegas Review-Journal

I further certify that I served a copy of this document by emailing a true and correct copy thereof addressed to:

Joel E. Tasca, Esq.
Justin A. Shiroff, Esq.
tasca@ballardspahr.com
shiroffj@ballardspahr.com

Margaret A. McLetchie, Esq.
Alina M. Shell, Esq.
maggie@nvlitigation.com;
alina@nvlitigation.com

/s/ Leah Dell
An employee of Marquis Aurbach Coffing